ADR and the courts

The dog that did not bark: mediation style

Laurence Boulle

This is the second in an occasional series of articles dealing with the ways in which the courts are defining and redefining aspects of ADR processes. For the first article see (2001) ADR Bulletin 3(10).

In *National Australia Bank Ltd v Freeman* [2000] QSC 295 (11 October 2000) the bank sued on a bill facility, seeking to recover over $1 million from Freeman, a Queensland farmer. The bank sought recovery of the pastoral land and stock which the defendant had provided as securities for the bill facility.

It was clear that the defendant farmer had defaulted in his obligations under the bill facility but he raised various defences relating to representations and promises made during a long period of dealings with the plaintiffs beginning in 1992. The dealings included a mediation and the lead up to the execution of a 'deed of mediation' in 1997.

Essentially, the deed involved the bank agreeing to forbear from foreclosing on the mortgage to allow Freeman to repay his indebtedness, outlined in the deed, through refinancing or selling the farm. The bill facility was arranged as a consequence of the deed of mediation which the bank and farmer had executed in December 1997.

Freeman alleged that the bank was estopped from enforcing its security because of misleading and deceptive conduct by its officers and unconscionable conduct in supplying of financial services. He also sought damages in negligence or under the provisions of the *Trade Practices Act 1974* (Cth).

An obstacle to Freeman's counterclaim was the inclusion in the deed of mediation of a release by Freeman in respect of any claims which he might have had against the bank. To overcome this Freeman asserted that both the deed of mediation and the bill facility arising out of it were voidable and had been voided by the bank.

To support his assertion the defendant farmer made a number of contentions relating to the circumstances surrounding the deed of mediation. Some of these were that:

- he was in a poor financial position and a weak bargaining position;
- the bank was in a strong financial position and a strong bargaining position;
- his legal advisors had been hurried in preparing for the mediation and they were not aware of the strength of his claims;
- he was under considerable pressure from the bank which was threatening to sell the farm immediately; and
- at various stages of the mediation he was suffering from stress and anxiety, was speaking disjointedly, shaking, foaming at the mouth, and was agitated and exhausted.

In short, the farmer's case revolved around the argument that during the mediation he was unfairly pressured and that he had no alternative but to sign the mediation agreement. He gave evidence to this effect and called as witnesses a psychiatrist and a neurologist, although their professional judgments were based mainly on the information he had provided to them.

For the bank, evidence was given by two of their officers who were present at the mediation, their solicitor, and by the mediator. Essentially, this evidence contradicted the assertions of the defendant on all material issues. The latter evidence was accepted by the Court which found that Freeman was capable of rational thought and informed consent during the negotiations and had no reduced mental capacity when he signed the agreement at the conclusion of the mediation. This resulted in judgment with costs being given in favour of the bank. ➢

'… the farmer's case revolved around the argument that during the mediation he was unfairly pressured and that he had no alternative but to sign the mediation agreement.'

➢ This case contained no novel issues in relation to the applicable law, and was certainly not remarkable for any of the factual aspects that arose. However, where a mediation is such an integral part of the pre-litigation process, and where it is the central element in a post-mediation trial, a number of issues with significance for the mediation process can arise.

The case of the *National Australia Bank v Freeman* raises the following issues of note.

- *The fact that the mediator was a witness for one of the parties at the trial following the mediation*.

This was like the Sherlock Holmes story in which the crucial clue for the learned detective was the fact that the dog did *not* bark in the night. In the *Freeman* case the significant factor was that, despite mediators often being contractually or statutorily protected from giving evidence and despite the policy factors supporting these arrangements (see below), a prominent mediator (now a Queensland judge) gave evidence without any apparent comment or objection from those concerned. The reason why 'the dog did not bark' was the nature of the Freeman defence which revolved almost entirely around his behaviour and state of mind during the course of the mediation. In other situations it is likely that the dog will bark when a mediator attempts to give evidence.

- *The implications for the 'without prejudice' privilege of the mediator's subsequent role as witness.*

The 'without prejudice' privilege will apply to most mediations, whether it is expressly provided for or not. The parties can waive the 'without prejudice' privilege and, by consent, lead evidence on what transpired in the mediation — it is, after all, a privilege not a rule of evidence. However, where one party wishes to call a mediator as witness against the other's objections there will necessarily be some dispute about the legality of the procedure and controversy over the relevant policy considerations. The mere presence of the independent mediator at settlement negotiations and the dictates of the 'best evidence' rule may result in narrower boundaries being drawn on this already narrow privilege. This will depend very much on the attitude of courts in forthcoming cases in which mediators are subpoenaed by one of the parties.

- *The fact that the mediator's evidence was critical in deciding the merits of the dispute*.

The case turned essentially on the credibility of the farmer's version of events. The mediator gave evidence on the finer detail of the discussions and negotiations, and even on such subjective factors as the farmer's apparent relief on signing the agreement. The Court found that the mediator had observed the farmer more than any other witness during the course of the mediation and that he had observed no symptomatology of the anxiety, helplessness, indecision or mental disability testified to by the defendant. At times the Court treated him almost like an expert witness, for example, noting:

> The mediator who had extensive experience in conducting mediations said that at no stage did it occur to him that the defendant may not be in a fit state to make a rational decision on the mediation.

In particular, the mediator denied that there was any pressure from the bank in inducing the farmer to sign the precedent agreement after it had been fine tuned by the parties and their lawyers. While the partisan views of the bank officials and their professional advisors would probably have been preferred in any event in this case, the evidence of a non-partisan witness to the events, the mediator, could in other cases become a decisive factor in establishing the onus of proof. This is quite unlike those situations in which the mediator is subpoenaed to testify on the terms and conditions of the mediation. For example where it is alleged no agreement will be binding until reduced to writing he or she becomes a critical witness in post-mediation hearing. This new resource, courtesy of the mediation process, could provide an incentive for parties to call mediators as witnesses in all manner of cases — even where the issues raised in the pleadings do not revolve so centrally around what transpired in the mediation as they did in the present case.

- *The impressions and perceptions of mediator independence and neutrality*.

Casting the mediator in the role of 'witness in chief', as described in the previous paragraph, will have inevitable consequences for the mediator's neutral position. He or she becomes one party's witness, subject to the rough and tumble of the adversarial litigation system, including its tendency to polarise perceptions and attitudes. This is not, of course, necessarily the fault of the mediator. In *Freeman* the farmer, in evidence, alleged that the mediator had told the parties that they had given away all their common law rights. He also alleged that the mediator had informed the defendant about the likely quantum range if he were successful on the counter-claims. The mediator had 'no recollection' and 'did not recall' such disclosures. He did, however, acknowledge advising the defendant that the plaintiff had the legal upper hand in relation to the securities and that Freeman was best advised to settle on the most favourable terms he could extract from the bank at the mediation. While these post-mediation developments do not reflect on the mediator's standard of care in relation to neutrality and impartiality during the actual mediation, they raise concerns about the more generic reputation of mediators, their neutrality and the mediation process. There is some irony in this: while mediators in court connected ADR schemes enjoy a widespread immunity from civil liability, they are not resisting the tendency of being drawn into the fray as partisan witnesses in post-mediation hearings.

- *Insights into the actual mediation process.*

For those outside the narrow circle of participants, the methods and processes of mediation remain something of a mystery. What does happen between consenting adults behind closed mediation doors? In the absence of any case reporting or other form of accessibility to the mediation process, satellite litigation around ADR provides some insights for outsiders. In the *Freeman* case we are exposed to what can be called the *auction* model of mediation which is, apparently, increasingly prevalent in commercial mediation circles. After around one hour the parties were separated from each other, they occupied separate rooms with their legal advisors, and the mediator became a ➢

➢ message conveyer for the rest of the day, ferrying bids and counter bids back and forth. This reduces the mediation process mainly to an arms' length combat over dollar figures, time limits and other 'numbers', with very little personal interaction between the parties, and even their advisors. At one stage Freeman furnished the mediator with a schedule relating to the proposed sale of cattle and this was shown, with consent, to the bank officials, but at no stage did the principals themselves discuss it together. Agreement was reached late in the day, apparently along the lines of a pro forma agreement produced by the bank, and after some fine tuning the parties came together for the final signature ritual. The 'auction' had succeeded and there was a commercial settlement but, as events were to show, there had been no real resolution of the dispute.

To return to basics: mediation was devised as an alternative to litigation and not as an alternative way of litigating. The original intent was not that mediators would report to courts on what transpired in the mediation. The *National Australia Bank v Freeman* case is a situation in which this was inevitable. However, courts should be wary about allowing parties too readily to call mediators as witnesses in support of their versions of events. To do so would undermine many of the strengths and values of the mediation process, including its confidential 'without prejudice' parameters. There is a delicate policy balance which is required here, namely between respecting the confidentiality and legitimacy of the mediation process, on one hand, and allowing the court process to operate optimally, on the other. Too much confidentiality will sterilise the court process. Too little will reduce the status and stature of mediation as an ADR option. ●

'… mediation was devised as an alternative to litigation and not as an alternative way of litigating. The original intent was not that mediators would report to courts on what transpired in the mediation.'

Laurence Boulle is Professor of Law at Bond University and can be contacted at <laurence_boulle@bond.edu.au>.